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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

JOHN DOE, by and through his parents and next friends, JANE DOE and JOE DOE, and the class of all others similarly situated,

Petitioners,

v.

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Individuals with Disabilities Education Act ("IDEA"), prior to its amendment on June 4, 1997, permitted a school district during an expulsion to discontinue educational services to a special education student whose misconduct was unrelated to his disability.

2. Whether the 1997 Amendments to the IDEA, which were enacted after the Seventh Circuit entered its judgment below, are prospective only and therefore inapplicable to this case.

3. Whether, prior to the 1997 Amendments, a school district that expelled a student for misconduct unrelated to his disability could lawfully discontinue educational services while due process proceedings were pending.

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OPPOSITION TO WRIT OF CERTIORARI

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on May 27, 1997. The Seventh Circuit's opinion is reported at 115 F.3d 1273 (7th Cir. 1997) and is included in the appendix to the Petition.

STATEMENT OF THE CASE

This case arose from a September 1994 decision by the Board of Education of Oak Park and River Forest High School 200 ("School District") to expel freshman John Doe ("Doe") for the remainder of the fall semester after he was found in possession of a pipe and marijuana while attending a school dance.

Although Doe was classified as learning disabled, by the time he enrolled as a high school freshman, he had been mainstreamed in all academic areas. At his mother's request and contrary to the recommendation of his elementary school staff, during his freshman year, Doe received limited special education services and undertook a normal academic load.

At the beginning of his freshman year, Doe was instructed as to the School District's regulations, including its prohibition of illegal substances on school grounds. Specifically, he received a copy of the regulations and he learned about the rule through his involvement on the school soccer team. In addition, on September 9, 1994, the rule was explained in Doe's homeroom class. Despite these warnings, later that same day (September 9), Doe

was found in possession of a pipe and a small amount of marijuana at a school dance. He was suspended for ten days pending consideration of expulsion in accordance with the School District's Code of Conduct.

On September 19, 1994, the School District convened two meetings concerning Doe's September 9 misconduct: one relating to special education and the other regarding disciplinary proceedings. Doe was represented by an attorney at both meetings. At the special education meeting, the staffing team concluded that there was no connection between Doe's learning disability and his bringing a pipe and marijuana to school.[1] At the expulsion hearing, Doe's attorney presented witnesses, cross-examined the School District's witnesses, and argued on Doe's behalf. After reviewing the hearing officer's report summarizing the evidence, the high school's Administrative Review Committee recommended that Doe be expelled in accordance with the Code of Conduct.

On September 22, 1994, the School District accepted the Committee's recommendation and Doe was expelled for the remainder of the fall semester. The next day, Doe filed a due process hearing request under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*. In December 1994, the Level I Hearing

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[1] The Petition does not present a fair summary of the facts. The Does cite solely to the Level II Hearing Officer's factual findings rather than those of the District Court (Petition at 5-7). The District Court expressly rejected the Level II findings and concluded, in accordance with the Level I decision, that the School District "possess[ed] adequate information with which to evaluate Doe at the September 19, 1994 [special education meeting]" (App. 47, 50).

Officer upheld the School Board's actions. Doe appealed and, in July 1995, the Level II Hearing Officer reversed the Level I decision.

On October 26, 1994, Doe and his parents ("the Does") filed an eight-count Complaint in the District Court in the Northern District of Illinois alleging that his expulsion violated his Fourteenth Amendment due process rights as well as other constitutional and statutory rights, including the IDEA.

On October 11, 1995, the District Court granted summary judgment in favor of the School District on the entire Complaint except Count VIII, which was the IDEA claim. The parties then filed cross-motions for summary judgment on Count VIII and the School District's counterclaim, which was filed on October 11, 1995, and which appealed from the Level II administrative decision. The District Court entered judgment in favor of the School District on all issues on July 10, 1996.[2]

On May 27, 1997, the Court of Appeals affirmed judgment in favor of the School District. The Seventh Circuit held that (1) the School District properly suspended educational services during Doe's expulsion because his misconduct was unrelated to his disability, (2) the stay-put provision of the IDEA was not implicated because Doe's misconduct was unrelated to his disability, and (3) the School District complied with the IDEA's due process requirements in connection with its decision to expel Doe.

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[2] In its July 10, 1996 ruling, the District Court reconsidered its judgment rendered on April 19, 1996, which was itself a reconsideration of its February 15, 1996 decision.

In addition, the Seventh Circuit rejected the Does' assertion that material issues of fact precluded granting summary judgment in favor of the School District. Specifically, the Does argued that the District Court committed reversible error in finding that evidence relating to "mitigating factors" was presented to the School District as part of Doe's disciplinary proceedings. Noting that it was "less than obvious" that the School District was required to consider any mitigating factors as a matter of law, the Seventh Circuit agreed with the District Court that Doe's defenses were adequately considered prior to expelling him.

On June 4, 1997, *after* the Seventh Circuit issued its opinion in this case, the President signed legislation that amended the IDEA. The 1997 Amendments revised the "fair and appropriate education" provision of the IDEA as follows:

> A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusively, *including children with disabilities* who have been suspended or expelled from school.

1997 Amendments to Individuals with Disabilities Education Act, § 612(a)(1) ("1997 Amendments" or "Amendments") (emphasis added).

On June 23, 1997, the Seventh Circuit ruled that the 1997 Amendments did not apply retroactively to the instant case and denied the Does' Petition for Rehearing.

ARGUMENT

I. Introduction.

As part of the School District's overall discipline program, which was in place when Doe was expelled, educational services to expelled students were totally discontinued. Pursuant to that policy, once the School District concluded that Doe's misconduct of bringing marijuana and a pipe to a school dance was unrelated to his disability, Doe was expelled for the remainder of the fall semester and his educational services were discontinued during that time. Given that his actions were not attributable to his disability, Doe was not entitled to be treated differently from other non-disabled students who were expelled for similar misconduct. The Does now petition this Court to review and reverse the decision of the United States Court of Appeals for the Seventh Circuit, which upheld the lawfulness of the School District's actions.

This Court should deny the Does' Petition for three reasons. First, the issues raised in this case lack the necessary legal significance to warrant the exercise of this Court's certiorari jurisdiction. Second, the 1997 Amendments to the IDEA are not retroactive and therefore did not apply to this case. Third, the Seventh Circuit correctly applied the IDEA, as it then existed, to the facts in this case.

II. The Seventh Circuit's Ruling That The School District Was Permitted Under The IDEA, As It Then Existed, To Discontinue Educational Services To Students Expelled For Reasons Unrelated To Their Disabilities Neither Raises An Important Recurring Legal Question Nor Conflicts With Decisions By This Court Or Other Courts Of Appeal.

Certiorari review is unwarranted in part because the Seventh Circuit's ruling will have little, if any, prospective effect on the rights of special education students other than Doe. Effective June 4, 1997, the IDEA was amended to "lead to a result different from the one reached [by the Seventh Circuit]" (App. 23). The Does' contention that, in the absence of review by this Court, "hundreds or even thousands of children in Illinois alone" will be adversely affected ignores the obvious effect of this significant statutory amendment (Petition at 12, n. 7).[3] Because of this change in the law, only students

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[3] Counsel Mary Denise Cahill's affidavit, which is attached to the Petition (App. 80-81), should be stricken for several reasons. First, it constitutes evidence outside of the record. *New Haven Inclusion Cases*, 399 U.S. 392 (1970) (refusing to consider newspaper articles which were not contained in the record); *see also DeTomaso v. McGinnis*, 970 F.2d 211, 214 (7th Cir. 1992) ("[a]n affidavit attached to a brief is not part of the record, and we order it stricken"). Second, the data purportedly obtained from the State Board of Education is inadmissible hearsay. Fed. R. Evid. 802. Third, the affidavit merely sets forth counsel's personal conclusions drawn from anecdotal data. *United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480 (1996) (rejecting affidavits which presented hearsay "statistics"). Finally, the meaning of the data referred to in the affidavit is unclear and therefore the data fails to support counsel's conclusory assertion that "more special education students were expelled without continuation of services after the District Court's ruling than before" (App. 81).

expelled prior to June 4, 1997 will be affected by the Seventh Circuit's judgment in this case. Review by this Court is therefore unnecessary because no recurring legal issue has been raised.

The Does' Petition should be denied also because the Seventh Circuit's decision in no way conflicts with this Court's rulings in *Honig v. Doe*, 484 U.S. 305 (1988), and *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993). The Seventh Circuit's holding bears solely on the issue of whether school districts may cease providing educational services to students expelled for reasons unrelated to their disabilities. This Court has never addressed that issue.

In claiming that the Court of Appeal's ruling is contrary to decisions of this Court, the Does misrepresent this Court's reasoning in *Honig v. Doe* (Petition at 16). In *Honig*, this Court observed that when Congress adopted the IDEA, it was responding in part to earlier judicial decisions, including *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), which indicated that handicapped students with emotional and behavior problems were often being expelled from school for behavior caused by their disabilities. *Honig*, therefore, was limited to holding that students with disabilities may not be unilaterally expelled if their misconduct *is related to* their disabilities. As this Court stated,

> Today we must decide whether . . . state and local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct *growing out of* their disabilities.

Honig, 484 U.S. at 308 (emphasis added). The Seventh Circuit recognized that the Does sought to extend this

Court's decision in *Honig* to a far different situation, and it properly declined that invitation.

The Does' citation to *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993), to assert a conflict is unavailing. In that case, this Court held that providing a sign-language interpreter to a special education student enrolled in a parochial school did not violate the Establishment Clause of the First Amendment. *Zobrest*, 509 U.S. at 10. Nowhere did this Court address the issue of the continuation of educational services to students during expulsions.

The Does' assertion that the Seventh Circuit's ruling in this case conflicts with decisions rendered by its sister circuits is also wrong. The only circuit courts that have directly addressed this issue, the Fourth and Ninth Circuits, reached decisions consistent with the Seventh Circuit, and held that nothing in the IDEA[4] prevented school districts from suspending educational services to students expelled for reasons unrelated to their disabilities. *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified*, *Honig v. Doe*, 484 U.S. 305 (1988).[5]

The cases cited by the Does from other circuits that take a contrary view create no conflict because with respect to this issue they are dicta (Petition at 16-17). For example, in *S-1 v. Turlington*, 635 F.2d 342 (5th

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[4] Because the 1997 Amendments to the IDEA are not retroactive, *see* Section III, *infra*, references herein to the "IDEA" refer to the statute as it existed prior to the June 4, 1997 legislation.

[5] These cases are discussed in Section IV.A., *infra*.

Cir.), *cert den.*, 454 U.S. 1030 (1981), which was decided prior to this Court's ruling in *Honig*, the Fifth Circuit reviewed the sufficiency of a school district's determination that a student's misconduct was unrelated to his disability. On the broader issue of expelling special education students, the court simply concluded:

> We therefore find that expulsion is still a proper disciplinary tool under the EHA and section 504 when proper procedures are utilized and under proper circumstances. We cannot, however, authorize the complete cessation of educational services during an expulsion period.

Turlington, 635 F.2d at 348. *See also Kaelin v. Grubbs*, 682 F.2d 595, 600-02 (6th Cir. 1982) (citing to *Turlington*'s conclusory dicta); *Board of Education of the City of Peoria v. Illinois State Board of Education*, 531 F. Supp. 148, 151 (N.D. Ill. 1982) (same). None of these cases rules on whether the cessation of special education services is proper when there is no causal connection between the student's misconduct and his or her disability.

Accordingly, the Petition should be denied because there is no conflict between the Seventh Circuit's ruling in this case and decisions by this Court or other courts of appeal. Furthermore, as discussed in Section IV.A. *infra*, the Seventh Circuit's reasoning is consistent with that of its sister circuits.

III. The 1997 IDEA Amendments Are Not Retroactive And Therefore Cannot Be Applied To This Case.

This Court need look no further than the effective date of the Individuals with Disabilities Act Amendments of 1997 to confirm that the application of the statute to this

case would constitute retroactive application which runs afoul of the *Ex Post Facto* Clause of the United States Constitution. U.S. Const. art. I, § 9, cl. 3 and § 10, cl. 1. By its terms, the legislation is prospective only and it would be unjust for this Court to apply the new law retroactively to the School District's actions taken in September 1994.

As this Court has stated, the *Ex Post Facto* Clause is violated when a law is applied "to events occurring before its enactment." *Miller v. Florida*, 482 U.S. 423, 430 (1987) (citations omitted). Congress has stated quite clearly that amended Section 1412(a)(1)(A), which applies to disabled students suspended or expelled, is not retroactive. Pub. L. 105-17, Title I, Sec. 612, 111 Stat. 49 ("[e]xcept as provided . . . the Individuals with Disabilities Education Act, as amended by title I, shall take effect upon the enactment of this Act"). The 1997 Amendments became effective on June 4, 1997, *after* the Seventh Circuit issued its ruling on May 27, 1997. Furthermore, the conduct at issue occurred in September 1994, and the Does filed their lawsuit against the School District in October 1994. *See Heather S. v. State of Wisconsin*, No. 96-3340, 1997 U.S. App. LEXIS 24927, at n.1 (7th Cir. Sept. 16, 1997) (declining to apply the IDEA's 1997 Amendments where the events giving rise to the action occurred before the date of enactment); *Cypress-Fairbanks Independent School District v. Michael F.*, 118 F.3d 245, 247 n.1 (5th Cir. 1997) (same). Because the Amendments were not in place when the complained of conduct arose, when the lawsuit was initiated, or when the Court of Appeals rendered its decision, the application of the 1997 Amendments to this case would constitute retroactive legislation in violation of the *Ex Post Facto* Clause.

The Does concede, as they must, that courts should apply the law in effect at the time they render their decision (Petition at 22). For example, in *Bradley v. School Board of Richmond, et al.*, 416 U.S. 696 (1974), this Court concluded that the new legislation applied in that instance precisely because it became effective while the case was pending on appeal and *before* the court of appeals issued its decision. Here, in contrast, the 1997 Amendments were not in effect as of the issuance of the Seventh Circuit's judgment. For this reason, the Does' contention that, under *Bradley*, retroactive application of the Amendments is proper misses the mark.[6]

The Does contend that the legislative history of the 1997 Amendments demonstrates that Congress intended the new law to apply retroactively. As support, they cite Congressman Martinez' statement during a House debate on the 1997 Amendments that the new legislation "clarif[ies] Congressional intent" (Petition at 17, 18, 21). This argument fails on several grounds. First, this Court need not look to legislative history where, as here, the statute's language leaves no trace of ambiguity as to its effective date. *Landgraf v. UST Film Products*, 511 U.S. 244, 280 (1994) (where "Congress has expressly prescribed the statute's proper reach . . . there is no need to resort to judicial default rules"); *Bath Iron Works Corp.*

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[6] Furthermore, the Does' contention that retroactive application of the 1997 Amendments would not result in an unforeseen or additional obligation on the School District is disingenuous because, at the time of the School District's conduct, the only decision on this issue, *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified, Honig v. Doe*, 484 U.S. 305 (1988), permitted discontinuation of educational services under the same circumstances. *See* Section IV.A., *infra*.

v. Director, Office of Workers' Compensation Program, 506 U.S. 153 (1993) (where text of statute is unambiguous, reviewing court accords no weight to senator's remarks during Senate floor debate). Second, the remark in no way mandates application of the Amendments to conduct which occurred three years prior.

Retroactive application of the 1997 Amendments is further unwarranted because doing so would impose an obligation on the School District which did not previously exist regarding the provision of services to expelled special education students under certain circumstances.[7] In September 1994, the School District expelled Doe for the remainder of the fall semester based upon misconduct that was not connected to his learning disability. From 1986 to May 1997, the three courts of appeal to consider the issue uniformly held that school districts could lawfully cease educational services to students expelled for reasons unrelated to their disabilities. *See* Section IV.A., *infra*. As of June 4, 1997, the IDEA states that "[a] free appropriate public education is available to all children with disabilities . . . *including children with disabilities* who have been suspended or expelled from school." 20 U.S.C. § 1412(a)(1)(A) (emphasis added). Because of this change in the law, the Seventh Circuit correctly conclud-

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[7] For this reason, the Does' application of this Court's *Bradley* factors is fatally flawed (Petition at 23). In asserting that "[t]he Board cannot claim that this is an unforeseen or additional obligation," the Does conveniently ignore rulings by the Fourth and Ninth Circuits and misconstrue the holdings of this Court and other courts of appeals. As set forth in Section IV.A., *infra*, the case law fully supported the Seventh Circuit's ruling that the IDEA did not require the continuation of educational services to students who are expelled for reasons unrelated to their disabilities.

ed that applying the 1997 Amendments to this case would have a "truly retroactive effect" because the School District would incur increased liability even though it acted properly under the law as it existed when the Does' claim arose in September 1994.

IV. The Seventh Circuit Correctly Concluded That The School District's Actions Complied With The IDEA As It Then Existed.

A. Prior To June 1997, The IDEA Did Not Require Continued Provision Of Services Or A Stay Of Placement To Students Expelled For Misconduct Unrelated To Their Disabilities.

The Seventh Circuit correctly held that nothing in the IDEA, as it then existed, prevented the School District from ceasing to provide educational services to Doe during his expulsion, once it determined that his misconduct was unrelated to his disability.

At that time, the IDEA did not impose, either expressly or implicitly, an obligation on school districts to continue educational services when students were expelled for misconduct which bore no causal connection to their disabilities. Rather, the IDEA required only that school districts "assure all children with disabilities *the right to* a free appropriate public education." 20 U.S.C. § 1412(1) (emphasis added). In contending that the School District's actions violated the IDEA, the Does focus exclusively on Congress' use of the word "all" in Section 1412(1). The Does assert that because Section 1412(1) of the IDEA referred to "all" children with disabilities, it prohibited a denial of services to any student, even when the student was expelled for misconduct totally unrelated

to his or her disability (Petition at 15). The Seventh Circuit correctly rejected this position, stating that:

> [T]he IDEA does not express an intent, either expressly or impliedly, to shield special education students from the normal consequences of their misconduct if that misconduct has nothing to do with their disabilities.

(App. 15). Where a student, like Doe, brought marijuana to school and there was no connection between his actions and his disability, the underlying purpose of the IDEA was attenuated as was any justification for the IDEA's encroachment on local school control. The Court of Appeals properly concluded that, by the same token, once the School District determined that Doe's misconduct was unrelated to his learning disability, the IDEA was no longer implicated and thus the stay-put provision did not apply.

In reaching its well-reasoned decision, the Seventh Circuit relied upon decisions rendered by its sisters in the Fourth and Ninth Circuits, the only other courts of appeal that directly addressed the issue at hand. *Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*); *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986), *aff'd as modified*, *Honig v. Doe*, 484 U.S. 305 (1988). Both the Fourth and Ninth Circuits concluded that nothing in the IDEA required school districts to discipline disabled students differently from non-disabled students, when their misconduct was in no way attributable to their disabilities. As the Fourth Circuit stated in *Riley*, 106 F.3d at 568:

> [N]either the text of section 1412(1), the legislative history, nor the purpose of the IDEA even suggests, much less mandates with the clarity necessary to confirm that the Congress actually

> confronted and deliberately decided, that a state must continue to provide education services for disabled children after expulsion for misconduct unrelated to their disabilities.

Hence, once a school district determined through proper procedures that a student's misconduct was unrelated to his disability, there was no reason to restrict its authority to cease providing educational services.

The Does broadly proclaim that, because the IDEA was intended to prevent "unilateral exclusion" of students from classrooms because of their disabilities, one can infer that, when it enacted the legislation, Congress meant to prohibit all exclusions, under all circumstances, even when students engaged in misconduct unrelated to their disabilities (Petition at 15). Such an inference goes well beyond the statute's purpose, as it existed prior to June 4, 1997. The IDEA was designed to prevent the denial of access to a free public education *because of* a student's disabilities. *See Board of Education v. Rowley*, 458 U.S. 176 (1982) (referring to the purpose of the IDEA as one giving disabled children *access* to public education). Indeed, this Court spoke to precisely that issue when it prohibited the cessation of services for misconduct *growing out of* a student's disabilities in *Honig v. Doe*, 484 U.S. 305, 308 (1988).

As the Ninth Circuit stated in *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd as modified, Honig v. Doe*, 484 U.S. 305 (1988),

> If a child's misbehavior is properly determined *not* to be a manifestation of his handicap, then the handicapped child can be expelled. This conclusion does not conflict with the [IDEA]. When a child's misbehavior does not result from his

> handicapping condition, there is simply no justification for exempting him from the rules, including those regarding expulsion, applicable to other children. Therefore, when a handicapped child is properly expelled, the school district may *cease providing all education services*—just as it could in any other case.

(emphasis added). Therefore, when a student engaged in misconduct that lacked any causal connection to his or her disabilities, before the 1997 Amendments, the IDEA was simply of no help.

The Does' reliance on the legislative history of the Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518, is unpersuasive. The narrow focus of that legislation undercuts the Does' contention that the legislation can be read to prohibit the cessation of education services to students who were expelled for reasons unrelated to their disabilities (Petition at 19, n.10). In that legislation, Congress sought to reconcile the Gun-Free Schools Act of 1994, 20 U.S.C. § 8921, which required a lengthy expulsion for students who brought certain weapons to school, with the IDEA. The legislation directed, however, that nothing in the IDEA should supersede the Gun-Free Schools Act with respect to children whose misconduct is unrelated to their disabilities. This provision suggests Congress's recognition that a student who brought a gun to school for reasons totally unrelated to his disability may be treated differently than one whose conduct was a manifestation of his disability.

The Does' reliance upon opinion letters issued by the Office of Special Education Programs ("OSEP") is misplaced. Under well-settled administrative law, an agen-

cy's interpretation of a statute or regulation is not binding on a reviewing tribunal. *Batterton v. Francis*, 432 U.S. 416 (1977). As the Seventh Circuit stated in *Production Tool Corp. v. Employment & Training Administration*, 688 F.2d 1161, 1165 (7th Cir. 1982):

> Interpretive rules, in contrast, have only persuasive force. Such rules are entitled to varying degrees of deference or weight, but a reviewing court ordinarily is free to substitute its own view of the relevant statute.

Courts have discretion to substitute their own judgment on all questions of statutory interpretation, including interpretation of the IDEA's requirement of a free appropriate public education, 20 U.S.C. § 1412(l). *Virginia v. Riley*, 106 F.3d at 568. Therefore, the Seventh Circuit properly discounted the Department of Education's opinion on this matter. The rationale articulated by the Department of Education was no different or more illuminating than the arguments made by the Does. The Court of Appeals was justified in determining that OSEP's position was *ultra vires* and that no deference was required.

In the absence of direct support in the text or legislative history of the IDEA, the Does now seek to refer to legislative history from the 1997 Amendments to support their contention that the IDEA, as originally enacted, prohibited the cessation of services for expulsions unrelated to a student's disability. As this Court has noted, however:

> The interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.

Public Employees Retirement System of Ohio v. Betts, 492 U.S. 158, 168 (1989). The comment in the Senate Committee Report that the 1997 Amendments were intended as a "clarification of current law" carries no weight. *E.E.O.C. v. Metropolitan Educational Enterprises, Inc.*, 60 F.3d 1225, 1229 (7th Cir. 1995) (noting that "[a] congressional report, even a conference report, is not legislation . . . and it does not change the law") (citations omitted), *cert. granted on other grounds*, ___ U.S. ___, 111 S.Ct. 1260 (1996). Hence, the legislative history of the 1997 Amendments fails to save the Does' claim.

B. The Seventh Circuit Correctly Concluded That The School District Complied With The Procedural Requirements Of The IDEA As It Then Existed.

The Does take issue with the Seventh Circuit's factual findings relating to whether the School District provided Doe with procedures sufficient to satisfy his Fourteenth Amendment due process rights. As a threshold matter, there is no cause for this Court to review the fact-bound question of whether the School District's actions complied with the IDEA because, in the absence of a circuit conflict or a question of importance, this Court's certiorari jurisdiction is not intended solely to correct an erroneous decision by a lower court. *United States v. Johnson*, 268 U.S. 220, 227 (1925) (noting that this Court "do[es] not grant a certiorari to review evidence and discuss specific facts"). In any event, the Seventh Circuit's conclusion that the School District complied with the procedural requirements of the IDEA was amply supported by the evidence.

In reviewing a special education decision rendered by an administrative agency, federal courts conduct a *de novo* review. *Gregory K. v. Longview School District*, 811 F.2d 1307, 1311 (9th Cir. 1987). While affording "due weight" to the hearing officer's conclusions, courts will independently review the record and base their decision on the preponderance of the evidence. *Id.*; 20 U.S.C. § 1415(e)(2).

The Seventh Circuit reviewed the evidence and ultimately agreed with the decision rendered by the Level I Hearing Officer. The Level I Hearing Officer reached the following conclusions regarding Doe's claim that the School District violated the IDEA by expelling him without first evaluating him for ADD or ADHD:

> There was testimony that [Doe's] conduct at times reflects a low self esteem, thus he will do something to look "cool" i.e., impress his peers. This was offered as an explanation for his possession and showing the bag of marijuana at the school dance . . . The psychologist, based on [Doe's] behavioral history and scholastic achievement, believed that [Doe] would behave spontaneously, impulsively, without being aware of the consequences of his action, but would have excellent control of his behavior when he understood the consequences of his action. [Doe] does know the difference between right and wrong. *I find that [Doe] did not act on impulse or spontaneously in this matter.* He had the marijuana for at least a day and had planned to bring it to the school dance. This was not a spontaneous act. [Doe] participated in a sport where the use of illegal substances was prohibited. Copies of those regulations were given to him and his parents and acknowledged by [Doe] and his parents. In

> addition, on the morning of the September 9, 1994, the rules of School District conduct were reviewed and [Doe] admitted to a school administrator that he was there at the time the rules of conduct were explained. *I find that [Doe] had every reason to know the serious consequences of his conduct regarding the possession of marijuana.*

(App. 68) (emphasis added). In making its findings, the Court of Appeals commented that, under the circumstances, "there was little likelihood that an ADHD evaluation would have affected the . . . determination that [Doe]'s misconduct was unrelated to his disability" (App. 17-18). The Level I Hearing Officer's conclusions were solidly supported by the documents and testimony admitted during the hearing and the Seventh Circuit agreed that the record compelled his conclusion.

Moreover, once the School District determined that Doe's misconduct of bringing marijuana and a pipe to a school dance was not caused by his disability, he was not entitled to a stay of placement pending his due process proceedings. As the Seventh Circuit concluded:

> [T]he "stay-put" provision of the IDEA is not implicated in a case like this, where the school district has made a reasoned determination following the procedures of the IDEA that a student's misbehavior is unrelated to his disability.

(App. 14). Therefore, the Does' contention that his expulsion was subject to the IDEA's stay-put provision is unavailing (Petition at 25).

CONCLUSION

In sum, the Petition failed to raise an important recurring legal question and there is no conflict between the Seventh Circuit and either this Court or other courts of appeal. Moreover, prior to the 1997 Amendments to the IDEA, the Fourth, Seventh, and Ninth Circuits uniformly held that school districts may cease providing services for special education students expelled for reasons unrelated to their disabilities. Therefore, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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